UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

SHAMEL ALEXANDER,
Plaintiff

v. No. 5:16-cv-192

ANDREW HUNT, PETER URBANOWICZ, PAUL DOUCETTE, and TOWN OF BENNINGTON,
Defendants

Plaintiff's Opposition to Defendants' Motion to Dismiss Counts II and III of Plaintiff's Amended Complaint

In this lawsuit, Plaintiff Shamel Alexander seeks to vindicate his rights to equal protection, against unreasonable search and seizure, and to freedom from race-based discrimination. Defendants have moved to dismiss certain claims in Mr. Alexander's amended complaint. Because the amended complaint's new allegations push his allegations across the line from conceivable to plausible, and because Defendants' motion misunderstands the amended allegations and applies standards inapplicable at the pleading stage, the Court should deny their motion to dismiss.

I. Statement of Facts

As spelled out in detail in his amended complaint, on July 11, 2013, Plaintiff Shamel Alexander, an African-American male, was traveling in Bennington, Vermont, in a taxi that hailed from New York, searching unsuccessfully for a Chinese restaurant whose correct name he did not know. Defendant Peter Urbanowicz, then a detective with the Bennington Police Department ("BPD"), thought Mr. Alexander and his conduct suspicious and encouraged Defendant Andrew Hunt, then an officer with BPD,

to try to find a reason to stop the taxi. Although Urbanowicz and Hunt were aware of information developed from anonymous tips and confidential informants that an African-American male who went by the nickname "Sizzle," accompanied by a female named Danielle Lake, brought controlled substances into Bennington via taxi and other forms of public transportation, neither officer believed—or had reason to believe—that Mr. Alexander was "Sizzle" (and he is not "Sizzle"). Instead, they treated him as a suspect because of his race.

After pretextually pulling over the taxi for a traffic violation and after completing his investigation into that violation, Hunt quickly converted the traffic stop into a drug investigation, thereby expanding the scope and extending the duration of the stop, notwithstanding the lack of reasonable suspicion to believe that Mr. Alexander was involved in any criminal activity. After conducting an illegal detention and search, Hunt located marijuana and heroin in Mr. Alexander's belongings.

The Vermont Supreme Court vacated Mr. Alexander's subsequent conviction of trafficking heroin, finding that Hunt's extension of the seizure violated the Fourth Amendment. In defiance of this ruling, Defendant Paul Doucette, Chief of the BPD, continued to insist that his officers had acted properly and that there was no need for the Department to make any changes in response to the violation of Mr. Alexander's constitutional rights. This civil rights lawsuit followed.

Defendants filed motions to dismiss the complaint. This Court granted in part and denied in part Defendant Hunt's and the Town's motions, granted Defendant Doucette's and the BPD's motions, and denied Defendant Urbanowicz's motion. As relevant to the pending motion, the Court held that Mr. Alexander had insufficiently pleaded his claims that the Town maintained a policy, practice, and or/custom of, or

failed to train or supervise its employees so as to prevent, unlawful discrimination on the basis of race and therefore dismissed his Title VI claim in its entirety and his Equal Protection claim insofar as it sought to impose municipal liability on the Town and supervisory liability on Defendant Doucette.

Mr. Alexander subsequently filed a motion to amend his complaint, asserting new factual allegations, not available at the time of the complaint or motion-to-dismiss briefing, related to a study documenting patterns of racial disparities in policing in many agencies across the State of Vermont, including in the BPD. In his amended complaint, Mr. Alexander reasserted his Title VI claim and his Equal Protection claim insofar as it sought to impose municipal liability on the Town and supervisory liability on Defendant Doucette. Defendants neither opposed nor supported this motion, which the Court granted. The pending Motion to Dismiss Counts II and III of Plaintiff's Amended Complaint ("Motion") followed.

II. The Motion to Dismiss Standard

In deciding a motion to dismiss for failure to state a claim, a court "accept[s] all factual allegations in the complaint as true and draw[s] all reasonable inferences in favor of the plaintiff." *E.E.O.C. v. Port Auth. of N.J. & N.Y.*, 768 F.3d 247, 253 (2d Cir. 2014). A complaint must allege "only enough facts to state a claim to relief that is plausible on its face," or, stated differently, only enough facts to "nudge[the] claims across the line from conceivable to plausible." *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007).

Defendants have correctly set out the general standards that apply to motions to dismiss, Motion at 2-3, but thereafter rely almost exclusively on cases that set out the

standards that apply in subsequent stages of litigation. Those few cases that resolved motions to dismiss improperly rely on standards that apply to summary judgment or trial without reconciling the different postures and/or are readily distinguishable from this case. When judged against the appropriate standards, Mr. Alexander's amended complaint alleges all that it need allege to withstand the pending motion to dismiss.

III. Argument

A. Defendants Have Introduced Documents Outside the Four Corners of the Complaint

Mr. Alexander does not oppose Defendants' request that the Court consider certain documents outside the four corners of the complaint, but he does note that such consideration is generally not appropriate at the motion-to-dismiss phase. As this Court stated in its order the first round of motions to dismiss, a document is typically deemed "integral to the complaint" where it is "a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls." *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016); *see also* Opinion & Order, May 16, 2017, ECF No. 35, at 9 (holding that transcripts from Mr. Alexander's criminal case were not "integral" to the complaint). The reports that Defendants attached to their motion do not set out the parties' legal obligations to one another. Defendants suggest that the Court can and should consider these documents because Mr. Alexander's claims "'stand or fail' [sic] based on the notice" these documents allegedly gave Defendants. Motion at 5. Leaving aside for the moment whether a plaintiff must allege facts establishing each element of a claim, *see infra* III.C.1, Defendants appear to argue for a standard that would allow consideration of exogenous documents any time they disprove, contradict, or even

weaken the allegations in a complaint. It is impossible to square Defendants' proposal with the standards that govern a 12(b)(6) motion, and with good reason—Defendants' proposal risks converting every motion to dismiss into a motion for summary judgment in which only the defendant submits evidence.

In addition, Defendants argue that the Court should evaluate these documents and weigh their reliability and evidentiary value in deciding this motion to dismiss. Of course, there will come a time where that will be the Court's task, *see* Fed. R. Evid. 702 (outlining court's gatekeeping tasks in determining whether expert testimony may be presented to jury); Fed. R. Civ. P. 56 (court must determine whether non-moving party has presented sufficient evidence to create a genuine issue of material fact); *see also, e.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and, ultimately, the jury's. That time is not at the motion-to-dismiss phase.

Nevertheless, Mr. Alexander does not object to the Court's consideration of these documents, if for no other reason than to rebut the serious accusations Defendants have levied against Mr. Alexander and/or his counsel.

B. Defendants Have Mischaracterized the Allegations in Mr. Alexander's Amended Complaint and the Reports Referenced Therein

Defendants' arguments that the amended complaint's allegations do not remedy the deficiencies the Court found in the original complaint rely on misunderstandings and mischaracterizations of both the new allegations and the events and reports on which they are based.

Defendants claim that Mr. Alexander inaccurately described the 2009 report on

Racial Profiling in Vermont, but they "correct" that description by restating exactly what the amended complaint alleged. Mr. Alexander stated that the report discussed racial profiling by law enforcement officers in Vermont, Am. Compl. ¶ 152; Defendants state that, "[o]n the contrary," this report does not mention Bennington or accuse its officers of racial profiling, Motion at 22. These two sentences are not contrary to one another. Mr. Alexander stated that the 2009 report noted the Vermont law enforcement agencies "had long been accused of racial profiling" and made recommendations about how to combat racial profiling, including the collection of driver race data for traffic stops, Am. Compl. ¶¶ 152-153; the Defendants state that the Report notes that "'anecdotal evidence . . . better reflects beliefs about racial profiling than statistically demonstrable facts,'" Motion at 22 (emphasis omitted). These two things are also entirely consistent; indeed, the inadequacy of anecdotal evidence standing alone was precisely why the Report recommended data collection so that conclusions could be reached based on statistically demonstrable facts. Mr. Alexander did not state or imply that the 2009 Report included statistical evidence documenting racial profiling. As noted in his motion to amend, the recommendations and findings in this report, along with the other pre-complaint allegations, were included to provide "background and context" to the allegations related to the 2017 statistical analysis. Mot. to Amend at 4. Nothing in Defendants' description of this Report contradicts or casts doubt on the amended complaint's allegations.

Defendants next argue that the fact that the 2017 statistical analysis included caveats and limitations means that Mr. Alexander withheld it from the Court's review in an attempt to mislead. Every legitimate statistical analysis includes a discussion of the study's caveats and limitations; no credible researcher claims otherwise and Mr.

Alexander did not claim otherwise. The fact that the researchers frankly acknowledge these caveats and limitations speaks to their credibility, but Defendants instead treat these professional imperatives as proof that their conclusions, and Mr. Alexander's reporting of those conclusions, are nothing more than a species of "lies" somewhere beyond regular "lies" and "damned lies." Motion at 23. Mr. Alexander did not incorporate this report by reference or attach it to his complaint simply because such documents are neither required nor typical accompaniments to a complaint—but he does intend to introduce it as evidence at the appropriate stage in the proceedings, at which point its conclusions can be tested and given appropriate weight by the factfinder.

Even more troubling is Defendants' claim that Mr. Alexander made "demonstrably false" claims about Defendant Doucette's statements. Motion at 5, 25. As discussed in Defendants' motion, ¶¶ 169-170 of the amended complaint discuss statements Defendant Doucette made at an October 2016 forum, at which time he had reviewed the BPD's stop data and concluded that those data did not demonstrate "any issue here in Bennington." However, these paragraphs do not mention the Seguino and Brooks analysis. This Seguino and Brooks analysis is discussed in ¶ 171, which makes no mention of the forum because this paragraph is not about events that occurred or statements that were made at it. This paragraph refers to statements he made "after being presented with the Seguino and Brooks analysis." As Defendants are presumably aware, having viewed the recording of the October forum, Motion at 5, 25, Defendant Doucette did not utter the quoted statement that night. And while Mr. Alexander regrets that he did not make it clearer in ¶ 171 of the amended complaint, the most cursory web search would have revealed that the statement comes from a January 18, 2017,

Bennington Banner article about the findings in the Seguino and Brooks report,[1] which had been presented publicly ten days earlier. Rather than doing the minimal checking necessary to dispel any confusion about the timing of the quoted statement, Defendants instead assumed that it never occurred. As the article makes clear, their unfounded assumption is "demonstrably false."

Shorn of Defendants' misunderstandings and mischaracterizations, the amended complaint's allegations are more than sufficient to state a claim for violation of his rights under Title VI and for supervisory and municipal liability for violation of his right to equal protection under the law.

C. Mr. Alexander's Amended Complaint Alleges Sufficient Factual Matter to Support his Supervisory and Municipal Liability Claims

In seeking dismissal of Mr. Alexander's Title VI claim and his Equal Protection claim based on municipal and supervisory liability, Defendants ask this Court to hold him to standards that simply do not apply at the motion-to-dismiss phase. *See* Opinion & Order 33-34 (noting that allegations that can withstand dismissal may not be enough, even if proven, to establish a claim at summary judgment or trial). The cases on which they rely can be divided into three general, sometimes overlapping, categories: (1) cases that did not resolve motions to dismiss but instead set out standards that apply to subsequent stages of civil proceedings; (2) motion-to-dismiss cases that improperly required the plaintiff to meet summary-judgment or trial standards or applied standards to motions to dismiss that have since been rejected by the Supreme Court;

[1] Makayla-Courtney McGeeney, Statewide study on racial disparities differs from local variables, Bennington Banner, Jan. 18, 2017, *available at* http://www.benningtonbanner.com/stories/statewide-study-on-racial-disparities-differs-from-local-variables,495550.

and (3) cases that decided motions to dismiss that are factually distinguishable, as the plaintiffs in those cases alleged *no* factual matter beyond the "mere conclusory statements" that are insufficient to survive a motion to dismiss.[2] None of these cases support dismissal of Mr. Alexander's claims; on the contrary, under the appropriate standards, his amended complaint more than meets his burden to allege sufficient factual matter from which to draw a reasonable inference that he was discriminated against on the basis of his race as a result of a municipal custom or policy and/or the failure to train, supervise, or discipline Bennington police officers.

1. Summary Judgment or Trial Standards Do Not Apply at the Motion-to-Dismiss Phase

To withstand a motion to dismiss, particularly regarding discrimination claims, a complaint need not allege factual matter supporting every element as to which a plaintiff must create a genuine issue of material fact at summary judgment or that a plaintiff must prove at trial. *See, e.g.*, *Selvon v. City of New York*, No. 13–CV–6626–FB–RML, 2015 WL 4728144, at *3 (E.D.N.Y. Aug. 10, 2015) ("[In the employment discrimination] context, *Twombl[]y* and *Iqbal* require enough nonconclusory facts to support of reasonable inference of liability, but they do not require a plaintiff to plead a complete prima facie case. . . . Applying the same reasoning to *Monell* claims, the Court concludes that Selvon need not—at this stage, at least—allege all elements of a prima facie case of municipal liability. Instead, he must simply allege facts that allow the Court to draw the

[2] This brief discusses many—but not all—of the cases in each category in the discussion that follows. For a listing of cases all Defendants have relied on to establish Mr. Alexander's purported pleading burdens, each case's posture, and, where necessary, additional notes demonstrating the case's inapplicability here, see Appendix A. This Appendix does not include cases that merely state the uncontroversial proposition that supervisors or municipalities cannot be liable under 42 U.S.C. § 1983 under a respondeat superior theory or otherwise do not speak to contested matters in this case.

inference that the constitutional violation was the result of a municipal policy of inaction, as opposed to isolated misconduct by a single actor." (citation and internal quotation marks omitted)). As this Court recognized in its motion-to-dismiss ruling, "the prima facie case 'is an evidentiary standard, not a pleading requirement.'" Opinion & Order at 20 (quoting *Swierkierwicz*, 534 U.S. at 510); *see also E.E.O.C. v. Port Auth. of N.J. & N.Y.*, 768 F.3d 247, 254 (2d Cir. 2014). So, while Mr. Alexander will ultimately be required to prove all elements of each of his claims, he need not allege factual matter supporting each of those elements now. *See Selvon*, 2015 WL 4728144, at *3 n.1 (outlining elements plaintiff "must eventually demonstrate"). All he must do at this stage is plead sufficient factual matter to allow a reasonable inference that the racial discrimination claim he has already successfully pleaded, *see* Opinion & Order 12-16, resulted from a municipal custom or policy and/or from the failure to adequately train, supervise, and/or discipline BPD officers. In his amended complaint, by alleging facts showing widespread and severe racial disparities in traffic stop data and official indifference to same, he has done precisely that.

Because the burdens are materially different, in resolving a motion to dismiss, a court cannot cite a standard applying to summary judgment or trial and simply replace "create a genuine issue of material fact" or "prove" with "allege" or "provide facts." *See, e.g.*, *Briscoe v. Jefferson County*, 500 Fed. App'x 274, 278 n.15 (5th Cir. 2012) ("A plaintiff may survive a motion to dismiss by pleading sufficient factual material to state a claim to relief that is plausible on its face. This is why courts must take care not to recast evidentiary standards as pleading requirements." (citations and internal quotation marks omitted)). But that is what the Defendants would have this Court do—substitute summary judgment and trial standards requiring evidence proving the

elements of each claim in the place of *Twombly's* requirement of facts from which a reasonable inference can be drawn. *Compare* Motion at 12 (""Deliberate indifference" in this context does not mean a collection of sloppy, or even reckless, oversights; it means [facts] showing an obvious, deliberate indifference' to the risk of the particular subordinate at issue inflicting the specific harm alleged." (quoting *Doe*, 103 F.3d at 508)), *with Doe*, 103 F.3d at 508 ("'Deliberate indifference' in this context does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to sexual abuse."); Motion at 15 ("[A] *Monell* claim 'flunk[s] the causation requirement' when based on factual assertions that 'uniformly partake of the *post hoc, ergo propter hoc* . . . fallacy,' rather than providing any facts showing how the training, supervision, or discipline (or lack thereof) 'actually resulted in' the alleged injury.'" (quoting *Carr v. Castle*, 337 F.3d 1221, 1232 (10th Cir. 2003)), *with Carr*, 337 F.3d at 1232 ("All of Carr's other assertions of alleged failure to train or inadequate training flunk the causation requirement, for they uniformly partake of the post hoc, ergo propter hoc fallacy rather than providing any evidence of how the training (or lack thereof) actually resulted in the excessive force."); Motion at 17 (policymaker could not have caused violation "unless there [are facts showing]" certain elements (quoting *Adams*, 2016 WL 155081, at *21), *with Adams*, 2016 WL 155081, at *21 ("unless there is some evidence"); Motion at 21 ("Rather, the plaintiff must [allege] an affirmative answer to the question: 'Would the injury have been avoided had the employee been trained under a program that was not deficient in the *identified respect*?'" (quoting *Hinojosa v. Butler*, 547 F.3d 285, 297 (5th Cir. 2008)), *with Hinojosa*, 547 F.3d at 297 ("Rather, the plaintiff must prove an affirmative answer to the question . . . ."); *and* Motion at 22 ("Such [allegations are] insufficient" (quoting

Hinojosa, 547 F.3d at 296), *with Hinojosa*, 547 F.3d at 296 ("Such evidence is insufficient").

Defendants' brief consists of page after page of citations to standards and burdens that are inapplicable at this stage; recitations of elements Mr. Alexander must "prove" or "establish" or "demonstrate" to "impose liability" on the Town or Defendant Doucette.[3] But denying the pending motion will not result in imposing any liability; it will simply allow this matter to proceed to discovery, so that, eventually, Mr. Alexander may meet his burden to prove his case.

2. This Court Should Not Rely on Cases Applying Summary Judgment or Trial Standards to Motions to Dismiss

Closely related to Defendants' citations to cases resolving motions for summary judgment or judgments entered on jury verdicts are several motion-to-dismiss cases where the courts inappropriately held the plaintiffs to standards applicable to summary judgment or trial. For example, Defendants cite *Kucera v. Tkac*, No. 5:12–cv–264, 2013 WL 1414441 (D. Vt. Apr. 8, 2013), for the standard that applies for imposing liability on a municipality—without recognizing that imposing liability is not the same as denying a motion to dismiss. Motion at 7. *Kucera* did decide a motion to dismiss—but, in doing so,

[3] For example, every case cited on pages 12-13 and 15 of Defendants' brief that purports to establish Mr. Alexander's burden on a motion to dismiss was either in summary judgment or trial posture. Likewise with every case cited for the purported burden a supervisory liability claim must meet to survive a motion to dismiss, Motion at 18-20, save for cases that decided a motion to dismiss under summary-judgment standards (*Kucera*) and/or have been abrogated (*Smith*, quoting *Rizzo*, which was an appeal from a judgment on a jury verdict). Tellingly, of all the cases cited in the section of the brief applying the standards to the facts at hand, Motion at 20-25, only three cases resolved motions to dismiss: (1) *Bourn*, which quoted and applied a summary-judgment standard, *see infra* Part III.C.2; (2) *Strauss*, which applied a standard abrogated by *Leatherman* and *Swierkiewicz*, *see infra* Part III.C.2; and (3) *Brady*, which, in the final sentence of the body of the brief, quotes the correct standard that applies and that Mr. Alexander has satisfied here: that plaintiff must allege "facts plausibly suggesting an official policy or custom that caused Plaintiff to be subjected to the denial of his constitutional rights."

quoted the summary judgment standard in *Wray v. City of New York*, 490 F.3d 189, 195 (2d Cir. 2007), without acknowledging the distinct postures of the two cases. Likewise, Defendants cite *Bourn v. Town of Bennington*, No. 1:09-cv-212-jgm, 2012 WL 2396875 (D. Vt. June 25, 2012), for the proposition that, in alleging a claim based on failure to supervise or failure to implement proper policies, a plaintiff "must allege 'a specific deficiency . . . such that it actually caused the constitutional deprivation.'" Motion at 21. But *Bourn*, in turn, was quoting a summary-judgment case that says, in full, "[i]n addition, *at the summary judgment stage*, plaintiffs must identify a specific deficiency in the city's training program and establish that that deficiency is closely related to the ultimate injury, such that it actually caused the constitutional deprivation." *Jenkins v. City of New York*, 478 F.3d 76, 94 (2d Cir. 2007) (emphasis added) (citation and internal quotation marks omitted)); *see also McTernan v. City of York*, 564 F.3d 636, 658 (3d Cir. 2009) (citing two decisions, one resolving a motion for summary judgment and one resolving a motion for judgment as a matter of law after presentation of plaintiff's case, for proposition that "[c]ustom requires proof of knowledge and acquiescence by the decisionmaker").

In addition, Defendants rely a pair of cases that have been abrogated in relevant part by *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Defendants cite *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985) (Motion at 4, 8, 24), and *Smith v. Ambrogio*, 456 F. Supp. 1130, 1137 (D. Conn. 1978) (Motion at 4, 9, 19), for the proposition that claims asserting municipal liability must make certain particularized factual allegations. Motion at 4. As this Court explained in its ruling on the motions to dismiss, *Swierkiewicz* and *Leatherman* held that courts may not impose

heightened pleading standards that are inconsistent with Fed. R. Civ. P. 8. Opinion & Order at 20. Both *Strauss* and *Smith* predate *Swierkiewicz* and *Leatherman*, purported to require heightened pleading requirements for municipal liability claims, and to that extent have been abrogated by those cases.[4] *See, e.g.*, *Wolf v. City of Chi. Heights*, 828 F. Supp. 520, 524 (N.D. Ill. 1993) ("Under *Strauss*[], the Seventh Circuit used to impose a heightened pleading standard on plaintiffs making constitutional claims against municipalities, but . . . that practice is now precluded by the Supreme Court's decision in *Leatherman*[]."); *see also Pitt v. City of New York*, 567 F. Supp. 417, 418-19 (S.D.N.Y. 1983) (recognizing, even prior to *Swierkiewicz* and *Leatherman*, that *Smith* relied on a particularized pleading standard whose vitality subsequent Second Circuit precedent "casts considerable doubt upon").

For example, Defendants cite *Smith* for the proposition that a plaintiff must, "[a]t a minimum . . . , specify the overt acts relied upon as a basis" for various elements of a municipal liability claim. Motion at 4. Yet the sentence immediately preceding this one makes clear that the court is requiring the heightened fact pleading that *Swierkierwicz* and *Leatherman* rejected: "The requirement of particularized fact pleading to state a valid conspiracy claim is equally appropriate for statement of a valid claim of municipal liability predicated on the inaction of senior officials that is tantamount to approval of unconstitutional acts by subordinates." *Smith*, 456 F. Supp. at 1137. To this extent, *Smith* is no longer good law and it does not apply to Mr. Alexander's complaint.

Under *Swierkiewicz* and *Leatherman*, complaints are held to the same standards regardless of whether their claims run against individual municipal employees or the

[4] This same analysis applies to *Dwares v. City of New York*, 985 F.3d 94, 100 (2d Cir. 1993), cited by Defendants on page 8 of their brief.

municipalities themselves. And, under *Twombly* and *Iqbal*, those standards provide that a plaintiff need not allege "heightened fact pleading of specifics," but only enough facts to "nudge[his] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. As discussed in below, *see infra* Part III.C.4, Mr. Alexander has done so.

3. Cases where Motions to Dismiss Were Properly Granted Are Readily Distinguishable

Finally, there are the few cases Defendants cited that did decide motions to dismiss under the applicable standards but that are readily distinguishable from this case.

In *Betts v. Rodriguez*, No. 15-CV-3836 (JPO), 2016 WL 7192088, at *5 (S.D.N.Y. Dec. 12, 2016), the plaintiff's sole *Monell* allegation was that the city "'actively promoted a Policy of unlawful profiling of blacks and other minority men and allowed and encouraged unwarranted stopping and frisking.'" The court, unsurprisingly, held that this allegation failed to plausibly allege a *Monell* claim because policies of racial profiling and unwarranted stopping and frisking were unrelated to and could not be causally related to his remaining substantive claims—excessive force and deliberate indifference to serious medical needs.[5] *Id.* In contrast, here, Mr. Alexander has plausibly alleged a policy and/or custom of racially discriminatory conduct, which is directly related to his claimed Equal Protection and Title VI injuries.

Defendants cite two cases for the proposition that "a plaintiff must plead facts showing both the existence of an official municipal policy or custom and a direct causal

[5] In addition, the court relied on *Reynolds v. Guiliani*, 506 F.3d 183, 193 (2d Cir. 2007)—a case appealing from a judgment entered after a bench trial—for the proposition that a plaintiff is required "to show that a municipal policy 'actually caused or was the moving force behind the alleged violations'").

link between it and the alleged constitutional deprivation." Motion at 8. But the cases cited don't support the proposition. *See Francis v. Hartford Police Dep't*, No. 3:11CV1344(VLB), 2012 WL 4815596, at *2 (D. Conn. Oct. 10, 2012) (dismissing *Monell* claim where plaintiff alleged only the isolated incident he experienced and had not made any allegations that the individual defendants acted pursuant to a custom or policy); *Moffett v. Town of Poughkeepsie*, No. 11–CV–6243 (ER), 2012 WL 3740724 (S.D.N.Y. Aug. 29, 2012) (dismissing *Monell* claim where only policy or custom allegations were alleged on information and belief and plaintiff provided no factual matter supporting the inference of a custom or policy).[6] Finally, Defendants cite several cases that are readily distinguishable insofar as the plaintiff failed to make *any* allegations from which it could be inferred that a municipal policy caused the alleged constitutional violation. *See Bourn*, 2012 WL 2396875 (dismissing claim where only *Monell* allegation was that individual defendants "acted on behalf of the town," which, if accepted as sufficient, would impose vicarious liability); *Brady v. Syracuse Police Dep't*, No. 5:12–CV–1384 (NAM/TWD), 2013 WL 286281, at *3 (N.D.N.Y. Jan. 2, 2013) (dismissing *Monell* claim where plaintiff alleged no facts plausibly suggesting existence of policy or custom); *Martinez v. State of Cal.*, 444 U.S. 277, 285 (1980) (dismissing 14th Amendment claim against state parole board based on parolee's murder of plaintiff's decedent; because parolee was not the board's agent and the board had no knowledge that decedent faced particular risk, parolee's independent act was too remote a consequence to hold board liable for deprivation of life).

Unlike these cases, here, Mr. Alexander has plausibly alleged a pervasive and

[6] In addition, the *Moffett* court relied on *Vippolis v. Village of Haverstraw*, 768 F.2d 40 (2d Cir. 1985)—a case appealing from a grant of summary judgment—when setting out the *Monell* standard. 2012 WL 3740724, at *4.

severe custom or policy of racial discrimination that is causally related to the racial discrimination he experienced at the hands of Defendants Urbanowicz and Hunt.

4. Mr. Alexander Has Satisfied his Burden Under the Standards Applicable at the Motion-to-Dismiss Phase

In its ruling on Defendants' first round of motions to dismiss, this Court held that Mr. Alexander had failed to allege sufficient facts "'tending to support, at least circumstantially, an inference that . . . a municipal policy or custom" of discriminating on the basis of race exists. Opinion & Order 21 (quoting *Triano v. Town of Harrison*, 895 F. Supp. 2d 526, 535 (S.D.N.Y. 2012) (internal quotation marks and citations omitted)). In his amended complaint, Mr. Alexander provided precisely those facts. With his allegations based on the 2017 study and responses to that study, Mr. Alexander has alleged sufficient factual matter to support his claim that the BPD has a severe, widespread racial profiling problem on which, at best, its leadership willfully turns a blind eye and that caused the constitutional injury that this Court has already found adequately pleaded.

As this Court noted in denying the Defendants' motion to dismiss Mr. Alexander's Fourth Amendment municipal liability claim, allegations may be sufficient to "nudge the claim of municipal liability from the conceivable to the plausible" even if proof of those allegations, without more, would not necessarily "be enough to establish municipal liability at summary judgment or in front of a jury." Opinion & Order 33-34; *see also id.* at 34-35 (quoting *García-Catalán v. United States*, 734 F.3d 100, 104 (1st Cir. 2013) ("But summary judgment, like a trial, hinges on the presence or absence of evidence, not on the adequacy of the pleadings. In light of this important distinction, the standards for

granting summary judgment are considerably different from the standards for granting a motion to dismiss."). Mr. Alexander does not argue that the factual allegations in his amended complaint, without any additional evidence, would be sufficient for the Court to grant judgment or a jury to return a verdict in his favor. All he argues is that those factual allegations are sufficient to withstand a motion to dismiss and entitle him to conduct discovery for that additional evidence.

One additional note: as Defendants argued with respect to Defendant Doucette's post-incident statements, Defendants argue here that the statistical analysis of data collected after the stop in question here "'could not be used to prove the existence of such a policy *before* the alleged behavior pattern began.'" Motion at 16 (quoting *Anderson v. City of New York*, 657 F. Supp. 1571, 1581 (S.D.N.Y. 1987)). There are two problems with this argument. First, Mr. Alexander is not called upon to "prove" the existence of anything at this stage in the proceedings.[7] And, second, Mr. Alexander relies on the 2017 analysis to raise an inference that, if BPD had a custom of racial profiling in 2014-2016 (the only years for which it has collected data that have, to date, been analyzed), it is plausible that the same custom existed in the summer of 2013. That is all he need do.

[7] Of note, all the cases Defendants cite, save one, for the proposition that proof of a custom or policy after the incident in question does not prove the existence of a policy at the time of the incident were resolving motions for summary judgment. *See Trujillo v. Campbell*, No. 09–cv–03011–CMA–KLM, 2012 WL 3609747, at *8 (D. Colo. Aug. 22, 2012); *Cordova v. Aragon*, 569 F.3d 1183, 1194 (10th Cir. 2009); *Howell v. City of Catoosa*, 729 F. Supp. 1308, 1311 n.6 (N.D. Okla. 1990); *Anderson*, 657 F. Supp. at 1581; *Burwell v. Peyton*, 131 F Supp. 3d 268, 304 (D. Vt. 2015). Only *Kucera*, 2013 WL 1414441, resolved a motion to dismiss but, as discussed *supra* Part III.C.2, that case applied a summary judgment standard without grappling with the implications of the different procedural postures.

IV. Conclusion

For the reasons set forth above, this Court should deny Defendants' motion to dismiss counts II and III against the Town and Defendant Doucette in Mr. Alexander's amended complaint.

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